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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Federal-State Joint Board on  
Universal Service

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CC Docket No. 96-45

NETWORK OPERATOR SERVICES, INC.  
PETITION FOR WAIVER OR,  
IN THE ALTERNATIVE,  
FOR RECONSIDERATION

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**NETWORK OPERATOR SERVICES, INC.'S  
PETITION FOR WAIVER OR, IN THE ALTERNATIVE,  
FOR RECONSIDERATION**

Pursuant to 47 C.F.R. § 1.3, Network Operator Services, Inc. ("NOS") hereby petitions the Federal Communications Commission ("Commission") to grant NOS a waiver from regulations requiring application of the Universal Service Worksheet, FCC Form 457, in order to calculate NOS's universal service fund contribution for 1998. Specifically, NOS seeks relief from the universal service assessment methodology that bases current year universal service contributions on revenues from the previous year, without true-up. Alternatively, pursuant to 47 C.F.R. §§ 1.106(a)(1) and 1.429 or 1.108, NOS petitions the Commission to reconsider its decision to direct the Universal Service Administrative Company ("USAC"), through application of FCC Form 457, to use prior year revenues in order to calculate contributors' current universal service contributions.

**I. Introduction and Background**

NOS is an interexchange carrier. NOS provides long distance services and 0+ operator services to end users and resellers and also performs billing and collection services for some

customers. As a telecommunications carrier that provides interstate telecommunications services, NOS is subject to Section 254(d) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), which requires such carriers to contribute to universal service. The Commission's Universal Service Order of May 8, 1997, established that all telecommunications carriers that provide interstate telecommunications services and certain other providers of interstate telecommunications must contribute to support universal service.<sup>1</sup> Contributions for the schools, libraries and health care provider programs are calculated based on a carrier's interstate, international and intrastate end-user telecommunications revenues.<sup>2</sup> Contributions for the high-cost and low-income programs are calculated based on a carrier's interstate and international end-user telecommunications revenues only.<sup>3</sup> In July of 1997, the Commission released its Report and Order and Second Order on Reconsideration ("Second Order").<sup>4</sup>

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<sup>1</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776 (1997) at para. 772 ("Universal Service Order"), *appeal pending sub nom.*, *Texas Office of Public Utility Counsel vs. FCC*, Case No. 97-60421 and consolidated cases (5<sup>th</sup> Cir.). Among other challenges to the Universal Service Order, some petitioners argue that the universal service "contribution" is a tax not originating in the U.S. House of Representatives, and therefore unconstitutional. See Brief of Petitioner Celpage, Inc., on Petitions for Review of an Order of the Federal Communications Commission, *Texas Office of Public Utility Counsel vs. FCC*, Case No. 97-60421 and consolidated cases (Feb. 20, 1998) (Hereinafter "Celpage").

<sup>2</sup> Universal Service Order at para. 772.

<sup>3</sup> *Id.*

<sup>4</sup> See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, *Federal-State Joint Board on Universal Service*, CC Dockets 97-21 and 96-45, Report and Order and Second Order on Reconsideration, FCC 97-253 (rel. July 18, 1997) ("Second Order") at paras. 41-43, 80. A draft copy of the worksheet appeared in an appendix. See *Id.* at Appendix C.

In the Second Order, the Commission directed the National Exchange Carrier Association to create USAC, an independently functioning, not-for-profit subsidiary, to perform the billing and collection functions associated with the universal service support mechanisms.<sup>5</sup> The Commission instructed USAC to use the Universal Service Worksheet to collect information regarding a carrier's universal service contribution. The Commission also effectively adopted a universal service assessment mechanism by requiring USAC to issue bills to contributors based on a formula that uses 1997 end-user telecommunications revenues to calculate 1998 contribution liability.<sup>6</sup> Although the Commission amended its rules to include the Universal Service Worksheet as the vehicle for complying with the contributor reporting requirements, those rules did not provide that a contributor's assessment would be based on the contributor's end user revenues from the previous year.<sup>7</sup>

The goals of the universal service program are admirable and NOS acknowledges that because it benefits from use of the public switched telephone network ("PSTN"), NOS has an obligation to support universal service. However, because NOS's business and end user revenues have changed substantially from 1997 to 1998, decreasing by approximately one-third, basing current year universal service contributions on 1997 revenues, without true-up, results in a contribution assessment against NOS that is both inequitable and discriminatory. In addition, the

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<sup>5</sup> See *Second Order*, at paras. 25, 41-42.

<sup>6</sup> See *Id.* at para. 43.

<sup>7</sup> See *Id.* at Appendix B-6; 47 C.F.R. §§ 54.709, 54.711 (1997).

current assessment methodology detrimentally affects NOS's competitive ability to provide telecommunications services and therefore violates the Commission's principle of competitive neutrality. In order to correct these inequities, NOS has made good faith payment to USAC for the months of January through April, 1998 based on actual end user revenues billed by NOS during those months, and is seeking, through this petition, waiver of the current assessment methodology.<sup>8</sup>

## **II. Good Cause Exists for Granting NOS's Petition for Waiver**

Under Section 1.3 of the Commission's Rules, the Commission may waive any provision of its rules on its own motion or on petition if good cause is shown.<sup>9</sup> The Commission has defined the standard for good cause as demonstration by a petitioner "that special circumstances warrant deviation from the rules and that such a deviation would better serve the public interest than the general rule."<sup>10</sup> Indeed, the "safety valve" provided by Section 1.3 is integral to the Commission's ability to adopt rules of general applicability.<sup>11</sup>

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<sup>8</sup> NOS intends to make good faith payments for the months of May and June, 1998 by early September and for the month of July, 1998 by early October.

<sup>9</sup> See 47 C.F.R. § 1.3.

<sup>10</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket No. 97-21, Order at para. 2 (rel. Sept. 29, 1997).

<sup>11</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (agency's discretion to proceed through general rules is intimately linked to the existence of a safety valve procedure for consideration of waiver requests based on special circumstances).

Special circumstances exist in this case because NOS will suffer extreme and unwarranted financial hardship as a result of application of the current universal service assessment mechanism. In cases in which a telecommunications service provider's revenues increase from year to year, or remain stagnant, the adopted method for calculating the universal service assessment produces satisfactory results. Because NOS's end-user revenues have essentially been cut by one-third from 1997 to 1998, *the monthly bill NOS has calculated*<sup>12</sup> *based on its actual 1998 monthly revenues is approximately one-third less than the monthly bill NOS received from USAC.* To base NOS's 1998 universal service assessment on its 1997 revenues would create an extreme hardship for NOS and threaten the company's ability to provide telecommunications services in the competitive marketplace.

The burden placed on NOS by the Commission's contribution assessment mechanism is potentially devastating.<sup>13</sup> NOS competes in an extremely competitive market. Like many IXC's, NOS experienced a net cost increase following the Commission's adoption of the new universal service mechanism and access charge reform. As did many other IXC's, NOS chose to recover some of its increased costs from its end users. However, because NOS has a smaller end user base in 1998

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<sup>12</sup> In calculating its contribution based on 1998 billed end user revenues, NOS followed the same methodology and used the same contribution factors included in USAC's explanation of how it derived NOS's monthly bills.

<sup>13</sup> As Commissioner Furchtgott-Roth noted in a dissent, the Commission's only legal means of fulfilling its promise to fund the new schools and libraries and rural health care universal service programs at \$2.65 billion annual level "is to impose devastating 'fees' on the interstate telecommunications market." *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67 (rel. April 10, 1998) (dissenting statement of Commissioner Furchtgott-Roth at 5).

than it did in 1997, if NOS were to assess the full cost of its universal service assessment based on 1997 revenues on its existing, smaller end user base, it would have to charge those end users much more than NOS's competitors are charging.<sup>14</sup> Given that NOS competes in an extremely competitive market, pass-through of NOS's inequitable assessment will essentially price NOS's services out of the market and cause NOS to lose customers. As NOS attempts to recover an inordinate universal service assessment from fewer and fewer customers, the cycle will eventually spiral out of control. Consumer choice will be restricted by NOS's inability to meet its competitors' prices and the financial liabilities associated with its universal service assessment could eventually force NOS out of business. Reducing consumer choice and bankrupting competitors is surely not the universal service policy endorsed by Congress in the 1996 Act. Under these circumstances, good cause exists for the Commission to grant a waiver of the application of the current assessment mechanism.

### **III. Petition for Reconsideration**

#### **A. Proposed Amendment to the Universal Service Assessment Methodology**

If the Commission determines that it will not grant NOS the waiver requested in Section II, NOS urges the Commission to amend its rules to permit carriers to make a one-time election to base their universal service contributions on current year revenues. As shown below in Section B, the Commission provided no policy reasons in its universal service orders to support basing universal service assessments on prior year revenues. Permitting carriers to base their universal service

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<sup>14</sup> NOS understands that many IXC's assess end users a charge on telecommunications revenues that range from approximately 4% to 5.4% of the end user's bill.



contributions on current year revenues would better tailor each carrier's liability to match its ability to pay. Although an individual carrier's revenues might vary widely from year to year, total industry revenues should remain relatively constant. Thus adopting a current-year election should not hinder the Commission's ability to predict total interstate, intrastate, and international revenues which are used to set contribution factors on a quarterly basis. Furthermore, the Commission could require electing carriers to: (1) submit contributions within 60 days of the end of the month; and (2) continue filing FCC Form 457 biannually. This would minimize the delay in collecting USF payments from electing carriers (under current procedures, universal service payments are due approximately 15 days after the end of the month) and would satisfy the Commission's need to collect prior year revenue information necessary to predict the total assessment base on a prospective basis.

**B. Procedural Issues**

Ordinarily, a petition for reconsideration must be filed thirty days from public notice of the final Commission action.<sup>15</sup> However, in the circumstances surrounding the adoption of the assessment mechanism, it is not clear what date constitutes public notice of the Commission's action adopting the mechanism, nor is it clear that the Commission followed the procedural requirements

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<sup>15</sup> See, 47 C.F.R. § 1.106(f) (1997). Public notice, in notice and comment rule makings, includes publication of a summary in the Federal Register. Publication of a summary of the Second Order, which included the Universal Service Worksheet as an appendix, appeared in the Federal Register on August 1, 1997. See Summary of Second Order, 62 Fed. Reg. 41294, 41305 (Aug. 1 1997). Therefore, under ordinary conditions, a petition for reconsideration would have had to been filed by September 1, 1997. See 47 C.F.R. §§ 1.429(d), 1.4(b)(1) (1997).

of the Administrative Procedures Act ("APA") with respect to the "rules" regarding the universal service assessment mechanism.

The rules adopted in the Universal Service Order provided that contributors would be required to contribute to universal service on the basis of intrastate, interstate and international end user telecommunications revenues. *See*, Universal Service Order, Appendix I at I-44 (47 C.F.R. § 54.703 (b) & (c)). The Commission discussed at length its reasons for including all three types of revenues (intrastate, interstate and international) in the assessment base. Universal Service Order at paras. 813-41. The Commission also discussed at length the reason for adopting the end user revenue method, as opposed to gross or net revenue method of assessment. Universal Service Order at paras. 843-57. Finally, the Commission provided notice that carriers' contributions to universal service based on this new methodology would begin January 1, 1998. Universal Service Order at para. 833. However, *in the May 8 Universal Service Order, the Commission never discussed the fact that 1998 contributions would be assessed based on 1997 revenues.*

In its Second Order, the Commission amended its universal service rules to require contributors to submit a Universal Service Worksheet. *See*, Second Order, Appendix B at B-6 (47 C.F.R. § 54.711(a)). Specifically, that rule provides that:

Contributions shall be calculated and filed in accordance with the Universal Service Worksheet. The Universal Service Worksheet sets forth information that the contributor must submit to the Administrator on a semi-annual basis. The Commission shall announce by Public Notice published in the Federal Register and on its website the manner of payment and dates by which payments must be made.

*Id.*

Buried on page 8 of Appendix C (a *draft* Universal Service Worksheet), the Commission provided contributors notice that 1998 contributions would be based on 1997 revenues:

Data filed on September 1 for the first half of the year will be used to calculate universal service support contributions for January to June. Data filed on March 31 for the whole prior calendar year will be used to calculate universal service support contributions for July through December.

Second Order, Appendix C at p. C-8. Although it was the first time such notice was provided, the draft Universal Service Worksheet was mentioned only briefly in the text of the Second Order, and no opportunity was provided to comment on its adoption. The FCC subsequently released a Public Notice on August 4, 1997, announcing that FCC Form 457 (the Universal Service Worksheet) had been approved by the Office of Management and Budget on July 31, 1997. Notice of OMB approval was published in the Federal Register on August 12, 1997. 62 Fed. Reg. 155, 43165 (Aug. 12, 1997).

Many carriers did not learn of the existence of FCC Form 457 until late August when the forms were distributed by USAC.<sup>16</sup> Nevertheless, despite the short notice and the lack of public discussion regarding FCC Form 457, carriers were required to submit the form by September 2, 1997. Since the Universal Service Order did not specify that the basis of the 1998 assessment

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<sup>16</sup> NOS has no record of receiving a FCC Form 457 from USAC. Rather, NOS learned of the Form through a trade association in which it participates, American Public Communications Council.

would be 1997 revenues, in adopting FCC Form 457, the Commission affected a substantive change in its universal service rules without notice and opportunity to comment.<sup>17</sup>

Even if the August 1, 1997 publication of the Second Order did constitute public notice under the APA, because petitions for reconsideration of the Commission's universal service orders are still pending, "the Commission retains jurisdiction to reconsider its own rules on its own motion."<sup>18</sup> The Commission has already reconsidered, on its own motion but based on requests by various parties, several aspects of its universal service rules as they relate to universal service contributions. For instance, on its own motion, the Commission found that universal service contributions should be collected on a monthly basis, rather than quarterly, and revised its rules accordingly.<sup>19</sup> The Commission also reconsidered, on its own motion, its determination that broadcasters providing interstate telecommunications on a non-common carrier basis must contribute to universal service, and revised its rules accordingly.<sup>20</sup>

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<sup>17</sup> Petitioners challenging the FCC's Universal Service Order in the U.S. Court of Appeals for the Fifth Circuit have also attacked the Commission's adoption of FCC Form 457 on various grounds. For example, Celpage argues that by requiring carriers to report "billed revenue" instead of "revenue" in the final version of the worksheet, the Commission made a substantive change in the worksheet without following the procedural requirements of the APA. Celpage at 50.

<sup>18</sup> *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service*, CC Docket No. 97-21, CC Docket No. 96-45, Second Order on Reconsideration in CC Docket No. 97-21, FCC 97-400, para. 3, n. 8 (rel. Nov. 26, 1997) (citations omitted).

<sup>19</sup> *Id.* (responding to request by USAC).

<sup>20</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Fourth Order on Reconsideration in CC Docket No. 96-45, FCC 97-420, para. 283 (rel. Dec. 30, 1997) (treating late-filed petition for reconsideration by Association of America's Public Television Stations

While NOS believes that its particular circumstances are compelling and justify a waiver, NOS acknowledges it is not the only carrier having difficulties meeting a universal service assessment based on 1997 revenues. For instance, Affinity Corporation, Operator Communications, Inc., National Telephone & Communications, Inc. and Hotel Communications, Inc. have all petitioned the Commission for similar relief. Furthermore, Commissioner Furchtgott-Roth has noted that USAC reported \$12 million in uncollectibles for the First Quarter of 1998,<sup>21</sup> and the Commission recently released Notices of Apparent Liability for Forfeiture concerning Operator Communications, Inc.'s and ConQuest Operator Service Corp.'s failure to pay their January, 1998 USF contributions. Given the potentially devastating impact of the current assessment methodology on carriers with declining revenues, the lack of opportunity to comment on the adoption of FCC Form 457, and the Commission's reconsideration on its own motion of other issues regarding the universal service contribution rules, NOS urges the Commission to address NOS's petition for reconsideration.

#### **IV. Conclusion**

For the foregoing reasons, NOS respectfully request that the Commission grant NOS a waiver from application of the Universal Service Worksheet and permit NOS to contribute to universal service based on actual, as opposed to prior year, revenues. In the alternative, if the Commission finds that good cause for granting the requested waiver does not exist, NOS respectfully

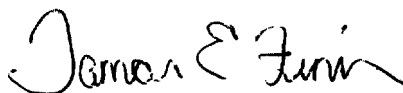
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requesting such relief as an informal comment).

<sup>21</sup> Report to Congress (Commissioner Furchtgott-Roth dissent at 11).

requests that the Commission reconsider its determination that current year contributions to universal service should be calculated based on prior year revenues.

Respectfully submitted,



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August 28, 1998

**Certificate of Service**

I, Wendy Mills, hereby certify that the foregoing Petition of Network Operator Services, Inc. was served on the following via hand delivery this 28th day of August, 1998.

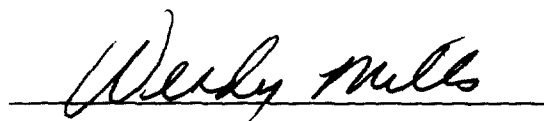
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A handwritten signature in cursive script, reading "Wendy Mills", is written over a horizontal line.

Wendy Mills